IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 8, 2005 Session

STATE OF TENNESSEE v. STEVEN JAMES ROLLINS

Appeal from the Circuit Court for Sullivan County
No. S45, 685 R. Jerry Beck, Judge

No. E2003-01811-CCA-R3-DD - Filed April 21, 2005

The defendant, Steven James Rollins, was convicted by a Sullivan County jury of premeditated murder, felony murder, and especially aggravated robbery. The felony murder conviction was merged with the premeditated murder conviction. The jury found that the state had proven five aggravating circumstances as provided in T.C.A. § 39-13-204(i): (2), the defendant was previously convicted of one or more violent felonies; (5), the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; (6), the murder was committed for the purpose of avoiding the lawful arrest or prosecution of the defendant; (7), the murder was knowingly committed while the defendant had a substantial role in the commission of a robbery; and (14), the murder victim was seventy years of age or older. Upon finding the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt, the jury sentenced the defendant to death. In a separate hearing, the trial court sentenced the defendant as a career offender to a consecutive term of sixty years for the especially aggravated robbery conviction. In this appeal as of right, the defendant challenges his first degree murder conviction and sentence of death. He contends that the trial court erred in failing to suppress his statements to investigating officers, in refusing to permit his co-defendant to invoke his privilege against self-incrimination in the jury's presence, and in denying his motion to dismiss the state's notice of intent to seek the death penalty. After review, we conclude that no harmful error exists, and we affirm the defendant's convictions and sentences.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. MCLIN, JJ., joined.

H. Randolph Fallin, Mountain City, Tennessee; Roger G. Day, Johnson City, Tennessee (on appeal); for the appellant, Steven James Rollins.[1]

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[1] James T. Bowman and Stacy L. Street were initially appointed as counsel of record at trial and argued various pre-trial motions, but were permitted to withdraw before trial began.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Michelle Chapman McIntire, Assistant Attorney General; H. Greeley Wells, District Attorney General; Barry P. Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The proof at the guilt phase of the defendant's trial showed that in August 2001, the defendant robbed and murdered John Bussell. Mr. Bussell was an eighty-one-year-old widower who owned and operated the Fisherman's Paradise bait shop in Colonial Heights near Kingsport.

Guilt Phase

Walter Hoskins testified that he had known the victim for five years and did maintenance work for him because the victim had trouble breathing, could not stand to be in the heat, and had poor eyesight. Mr. Hoskins stated the victim sold bait and operated a barbeque trailer and always kept at least $1,000 in his wallet. Mr. Hoskins said he had warned the victim against pulling out the "wad" of money whenever he made change. He also advised the victim against selling bait late at night after the bait shop had closed, but the victim had continued these practices. Mr. Hoskins noted that the victim always carried a "little two shot Derringer" handgun in his right, front pants pocket. He last spoke with the victim on August 21, 2001, at about 10:30 p.m.

Ottie McGuire testified that he was a friend of the victim for ten years and ate breakfast with him nearly every day. On the morning of August 22, he went to the victim's camper at about 8:30 a.m. He noticed the lights to the restaurant were not yet on, which was unusual. He also noticed the victim's newspaper was still in the box and the door to the victim's camper was partly open. He "pecked" the window and hollered, but no one answered. Afraid the victim may have had a heart attack, Mr. McGuire went to the fire department and returned with a fireman. They looked around the camper and found things scattered about. Mr. McGuire said that the victim always carried cash and that everyone who knew him told him not to carry so much money.

Officer Jamie Free of the Sullivan County Sheriff's Office testified that he was dispatched to the victim's bait shop at 9:38 a.m. on a "welfare call." He said he first looked inside the camper and found it completely ransacked. He went around to the bait shop, looked through the window, and saw what looked like a head lying on the floor between two display racks. Officer Free stated he took down the chained sign hanging across the door and kicked the door down. He found the victim lying in a very large pool of blood behind the counter. The victim's clothes were blood-soaked and he did not appear to be breathing. Officer Free noticed several minnows and cups used to catch them lying on the floor near the minnow tanks. Bloody shoe prints inside the shop led outside and around to the victim's camper. Officer Free said that he roped off the area, maintained the crime scene, and that an investigation ensued. Paramedics arrived and confirmed that the victim was dead.

Denise Buckner, a forensic chemist with the TBI Crime Laboratory, testified that she was a member of the Violent Crime Response Team that responded to the crime scene on the afternoon of August 22. The team processed the victim's camper, the bait shop, and the area outside. The cash drawer in the bait shop was found open and empty, and the change drawer was on the floor next to the victim. In addition to bloody foot tracks leading from the bait shop to the camper, blood smears were found on a variety of the victim's personal belongings in his camper. A $1,150 wad of cash, covered by other items, was found on the floor of the camper. Ms. Buckner testified that 112.5 man hours were spent processing the crime scene but that no forensic evidence was obtained which could be compared to the defendant or to anyone else. She explained that the blood evidence belonged to the victim, that no identifiable latent fingerprints were discovered, and that investigators had no shoe to compare with the bloody footprints found at the scene.

Sullivan County Sheriff's Detective Bobby Russell testified that on August 25, 2001, he located the defendant in Kingsport in order to question him as part of the investigation into the victim's murder. The defendant agreed to come to the sheriff's office for questioning and his girlfriend, Angela Salyers, accompanied him. Detective Russell said that he questioned the defendant and that he did not read the defendant his Miranda rights because the investigation was ongoing and the defendant had not been arrested. He said the defendant was aware of what was going on and was cooperative and responsive. He noted that the defendant was free to leave at any point and did not have to give a statement. Detective Russell noted the defendant did not admit to any participation in or knowledge of the victim's murder in his August 25 statement. The defendant stated that he had never met "the old man" but that Ricky Frasier, whom he worked for at a roofing company, "said something about going over there and knocking on the trailer and knocking him in the head. He said he had maybe $40,000.00 or something." The defendant told Detective Russell that about three weeks earlier, he had gone with Frasier and Larry Cowden, who also worked at the roofing company, to a drive-in restaurant across the road from the victim's trailer and watched the victim for a while. The defendant opined that Frasier and Cowden had not yet figured out "their plan."

Lieutenant Richard Russell, Chief Investigator for the sheriff's department in Scott County, Virginia, testified that about a month before the victim's murder, he had a conversation in Scott County with the defendant in which the defendant told him that he knew two men who had discussed robbing an old man who owned a bait shop and carried a lot of money. Lieutenant Russell said that he had the impression the defendant was talking about something that had already happened. Lieutenant Russell stated that none of his investigators knew of such an incident but that after he learned of the Bussell murder, he contacted Sullivan County and related his earlier conversation with the defendant to investigators.

Ronnie Lane testified that he sold the victim a two-shot Derringer about a month before his murder. He said he was aware the victim often carried a large amount of money and had cautioned him about this.

Allen Linkous, a scuba instructor and special deputy with the sheriff's office, testified that on September 26, 2001, he was called to dive and search for a gun in the Holston River near Eastman. He took the Derringer he located on the bottom of the river to the sheriff's office.

Detective Bobby Russell was recalled to the stand and testified that as the murder investigation proceeded, he was unable to locate the defendant again. In October 2001, he received information that the defendant and Angela Salyers were in Republic, Michigan. Detective Russell and other Sullivan County officers traveled to Marquette County, Michigan, where the defendant and Salyers were arrested pursuant to presentments issued from Sullivan County. They were immediately transported to Michigan State Police Headquarters and placed in separate rooms. Detective Russell said he advised the defendant that he was being charged with the first degree murder of John Bussell. The defendant was allowed briefly to speak with Salyers. Detective Russell stated that he advised the defendant of his Miranda rights. The defendant signed a waiver of those rights and gave a statement which Detective Russell reduced to writing.

In this second statement, dated October 9, 2001, the defendant described the events surrounding the victim's murder. According to the defendant, "Kojack," later identified as co-defendant Greg Fleenor, owed him money. The defendant told Fleenor "about this old man that had a fishing bait place and carried a lot of money," and Fleenor said, "Let's go do it." The defendant stated he was "turning on cocaine real bad" at the time. Throughout that day and night, Fleenor told the defendant they would be better off if the defendant killed the victim, but the defendant said he could not do it. With the defendant driving, he, Fleenor, Salyers and Fleenor's girlfriend, Ashley Cooper, went to the victim's bait shop. The defendant rang the doorbell, but the shop was closed. He and Fleenor went to the victim's camper, and the defendant knocked on the door. The victim answered, and the defendant said that he needed some bait. The defendant and Salyers entered the bait shop with the victim. The defendant recalled that Fleenor was standing at the door. As the victim was getting the bait, the defendant reached for the victim's shoulder and the victim reached for his gun. The defendant grabbed the victim's hand and retrieved his own knife. The defendant stated, "That's when I cut him." He could not recall how many times he cut the victim. The defendant then went to the victim's camper looking for his money. Fleenor took the victim's wallet from his pants. Later that night, the defendant, Fleenor, Salyers and Cooper went to Fleenor's house, where Fleenor counted the money and they looked through some of the victim's belongings. Then they drove to Knoxville and bought cocaine. The defendant stated that he later disposed of his clothing, his knife and some of the victim's belongings in garbage bags at different locations. He threw the victim's gun into the river at Eastman. He repeated that it was Fleenor's idea to kill the victim and that he had no intention of killing him. The defendant stated he was high and strung out on cocaine during the murder. He added that Fleenor paid for four pairs of gloves the defendant bought that night. The defendant did not recall wearing gloves but did recall washing his hands in the minnow tank after the stabbing. In concluding the statement, the defendant said that he left Kingsport after the murder because Larry Cowden was after him and that "this had a little bit to do with it, too."

Detective Russell testified that the day after their arrests in Michigan, the defendant and Salyers were transported back to Tennessee, arriving on October 11. Detective Russell stated that as they approached Sullivan County, the defendant requested to speak with the detectives again to clarify some things. The defendant was taken to jail for the night and brought to the detective division the following day, October 12, where he gave a third statement after first waiving his Miranda rights. The defendant's account of the murder was essentially the same as in the October 9 statement, but he gave more details. The defendant explained that his plan was to keep the victim in the bait shop in order that the others could go through the camper. The defendant also recalled that the victim struggled with him during the attack and that the defendant made sure the victim was dead before leaving the bait shop. The defendant concluded his statement by asking for mercy for his girlfriend and stating, "I know I should be punished."

Detective Joey Strickler testified that he was present along with Detective Russell during most of the defendant's interviews on October 9 and 12. He noted that before the defendant's arrest in Michigan, the victim's Derringer had already been recovered from the Holston River. Detective Strickler stated the defendant's statements contained nothing that the defendant did not freely tell the detectives. Detective Strickler noted that during the investigation, other persons were interviewed, including Ricky Frazier and Larry Cowden, who were eliminated as suspects. Detective Strickler agreed that it was the sheriff's office policy not to record statements electronically.

Dr. Gretel Harlan Stevens, a forensic pathologist, testified that she viewed the victim's body at the crime scene and later performed the autopsy. She said the victim bled to death from multiple stab wounds. Her examination revealed that the victim suffered from heart-related conditions, lung disease, an arthritic spine, and other "fairly involved medical-type disease processes." Dr. Harlan described the victim's injuries, beginning with a six-inch slash from his left ear across his neck which severed a major vein and artery, cutting off blood supply to the brain. The wound would have rendered the victim unconscious immediately and dead within four minutes. She explained that this wound was sustained later in the attack, as indicated by evidence that the victim was moving around and conscious when he received other wounds, particularly those to his hands. There was a second slash across the neck, which also would have been fatal without prompt medical care but would not have rendered the victim unconscious immediately. A third potentially fatal stab wound went through the shoulder and into the chest and heart. In addition, Dr. Harlan noted multiple stab wounds to the collarbone, chest, abdomen, and on the back from the armpit to the waist as well as wounds to the victim's hands. These injuries would have been painful but were not necessarily life-threatening. Dr. Harlan noted twenty-seven, possibly twenty-eight, stab wounds in all. She testified that the nature of the wounds indicated that the victim initially did a "fairly good job" for someone of his health and age in trying to fend off his attacker. Dr. Harlan said that although the assault was not a measured attack, the wounds were intentionally inflicted.

Defendant's Proof

The defendant testified that he was thirty-eight years old, divorced, and a father of two. He said he made "straight F's" in school but was promoted until he reached ninth grade, when he was

placed in vocational school and dropped out. He said he could not read or write except for being able to print letters. He had been a cocaine addict for the past fifteen years and had attempted treatment without success. He had worked as a painter and at a salvage yard. The defendant testified that at the time of the murder, he had a job but stayed home to do cocaine. About a month before the murder, he met Angela Salyers at a bar and the two moved in together. During the same time, a friend introduced the defendant to Greg Fleenor, a cocaine dealer. The defendant stated that a month or two before the murder, he worked for Ricky Fraiser and Larry Cowden doing roofing work and that they told him they wanted to rob an old man who had money. The defendant said he reported this to detectives in Gate City because he "didn't want nothing to happen to him . . . ." The defendant stated that Fleenor told him about a warehouse where they could steal a truck loaded with cigarettes to get some money. Fleenor also wanted to "check out" the man that ran the bait shop.

According to the defendant, he and Salyers met Fleenor and his girlfriend one night, and the defendant believed they were going to check out the warehouse. Instead, around midnight, Fleenor told the defendant to drive by the bait shop. The defendant testified that Fleenor gave him $10 and told him to go inside a gas station and get cigarettes, soft drinks, and some gloves. The defendant bought four pairs of gloves, and Fleenor told him to drive back to the bait shop. The defendant stated he was on cocaine that night. He also said he was afraid of Fleenor's father as well as Fleenor. The defendant testified that at the bait shop, Fleenor told him to buy some bait while Fleenor checked things out. He said he did not know Fleenor intended to rob the victim. The defendant testified that Salyers rang the doorbell and no one answered. They went to the camper and asked the victim to sell them some bait. The victim agreed, and they followed him to the bait shop. The defendant had no money and told Salyers to get some money from Fleenor to pay for the minnows. According to the defendant, he followed Salyers outside as Fleenor was standing near the door. Fleenor instructed him to go to the camper and "see if you can find anything." The defendant stated he never touched the victim. He said he carried a small "Old Timer" knife that had a broken blade tip which was on him when he was arrested. He said Fleenor usually carried a lock blade knife that he used for cutting cocaine. The defendant stated that he was inside the victim's trailer for five or ten minutes and collected two boxes of items. Fleenor came to the trailer and said he had taken care of it. The defendant testified that Fleenor had the victim's gun, his wallet and a wad of "money [that] had blood on it from the cash register or something." The defendant asked Fleenor if he could go check on the old man and Fleenor replied, "No. Let's get the f*** out of here."

The defendant testified that the group went to Fleenor's father's house where Fleenor talked to his father on a cellular telephone. According to the defendant, Fleenor then told the defendant that he had killed the old man and warned the defendant to keep his mouth shut. Fleenor said he also needed to kill both of their girlfriends. Fleenor's father spoke to the defendant by telephone, told the defendant he had better keep Salyers quiet, and threatened the defendant's family. The group drove to Knoxville to buy cocaine, stopping on the way to dispose of clothing and gloves. They returned to Kingsport and Fleenor left to see his parole officer, leaving the gun, the money and the cocaine at his mother's trailer. Ashley Cooper retrieved the gun, gave it to the defendant, and the defendant threw it into the river.

Asked whether he told detectives during his initial interview that he could not read or write, the defendant responded, "I think I did. Yeah." He acknowledged signing a statement, but testified that it could have said anything because he could not read it. The defendant explained that he did not tell detectives initially what he knew about the murder because he was afraid for his girlfriend and his mother. The defendant stated that he and Salyers went to Michigan, where he had family, because he was afraid Fleenor or his dad would kill Salyers.

The defendant testified that he told detectives that he had killed the victim because he was scared of Fleenor and Fleenor's father and was protecting his family. He explained that he knew details of the crime both from Fleenor and from things the detectives told him before he gave his statements. The defendant testified that he asked and was allowed to ride back to Tennessee in the same car with Salyers. He stated he told the officers he would give a statement if they let them ride together. He stated the officers treated them nicely and got him to confess to something he did not do. The defendant testified that before he gave his statement in Sullivan County, Fleenor's father was put into the same jail with him and threatened him. He said he gave the statement because he was scared. According to the defendant, since he had been in jail, Fleenor had tried to send him money and notes asking the defendant to "cover" for him. The defendant agreed he made the October 9 and October 12 statements of his own free will, but he explained that they were untrue and given out of fear.

On cross-examination, the defendant acknowledged signing forms requesting appointed counsel and listing his inmate grievances. He agreed that he could read, print and spell "just a little." The defendant admitted to thirteen prior convictions from August 1995 to November 1996 for aggravated burglaries and one felony theft.

In rebuttal, Rana Jandron of the Marquette County Sheriff's Office in Michigan testified that she booked the defendant after his arrest. When questioned, the defendant told her he could read and write "a little bit," enough to write a letter.

Angela Salyers testified that she was the defendant's former girlfriend and that she had been tried for first degree murder but convicted of facilitation of robbery. She stated that she was inside the bait shop when the defendant and the victim began fighting but that she left before anything happened. Salyers testified that the defendant attacked and killed the victim. On cross-examination, Salyers stated that she lied about the events when first questioned on August 25, 2001, but that she told the truth after being arrested in Michigan. She also claimed she was testifying truthfully at the defendant's trial because she no longer had a reason to lie.

The jury found the defendant guilty of premeditated first degree murder, felony murder, and especially aggravated robbery.

Penalty Phase

The state first introduced the defendant's two prior convictions for aggravated assault. Next, the state recalled Dr. Stevens, the pathologist, who described various stab wounds the victim suffered which were non-fatal, in that they were "not something that would have killed him in a quick fashion." She said blood found on the bottom of his socks indicated that the victim suffered at least some of the stab wounds while he was alive and could feel them.

Marie Carpenter testified the victim was her uncle and a father-figure to her. She visited him once a week and spoke to him every evening by phone. She testified that at the time of his death, he was an eighty-one-year-old widower with no children. He had operated his restaurant and bait shop for thirty years and, before that, he had sold produce at the same location. Ms. Carpenter noted that the victim had arthritis and a breathing problem but was generally able to care for himself.

The defense introduced a 1978 psychological report on the defendant. The report reflected that the defendant was born in August 1964, that his parents were divorced, and that he lived with his grandmother. His mother was not well, physically or mentally, and had a third grade education. The defendant had received speech therapy and was repeating the seventh grade in school. He was enrolled in vocational training to do automobile body work. Teacher comments indicated that he was "basically a non-reader" and could not spell or write. Testing results indicated that he was functioning academically at a second-grade level in all areas and that his IQ was slightly above the retarded range. The defense elected not to present any mitigation witnesses and rested its case.

Following deliberations, the jury sentenced the defendant to death for the murder of John Bussell. The jury found that the state had proven all five of the alleged aggravating circumstances: the defendant was previously convicted of one or more violent felonies; the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; the murder was committed for the purpose of avoiding the lawful arrest or prosecution of the defendant or another; the murder was knowingly committed by the defendant while he was committing or attempting to commit a robbery; and the murder victim was seventy years of age or older. See T.C.A. §§ 39-13-204(i)(2), (5), (6), (7), (14). The jury also found that the statutory aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt.

I. FAILURE TO RECORD STATEMENTS ELECTRONICALLY

The defendant argues that the trial court should have suppressed all three of his statements because they were not electronically recorded. He asserts that it is the policy of the Sullivan County Sheriff's Office not to use electronic recording devices with suspects and submits that the failure to record his statements electronically pursuant to this policy violates his due process rights given the heightened scrutiny afforded capital cases.

During the state's case-in-chief, Detective Russell testified regarding the manner in which he recorded the defendant's first statement taken on August 25. He stated that following his usual procedure, he asked the defendant questions and wrote down the defendant's responses as accurately as possible in the order they were given. After the statement was finished, he allowed the defendant to read the statement or reviewed it with him and allowed the defendant to note any corrections, deletions, or additions. The defendant then signed each page. On cross-examination, Detective Russell acknowledged he did not use a tape recorder or video camera to record the defendant's statements. Pressed whether such equipment was available to him, Detective Russell responded, "We do not use those as a matter of policy." Detective Russell further testified that he was uncertain whether there was a written departmental policy that the officers not record interviews, stating only, "I do know we do not do that."

Initially, we agree with the state's position that the defendant has waived his right to contest the admissibility of his August 25 statement. In his first motion to suppress, the defendant generally moved the court to exclude any illegally or unconstitutionally obtained evidence. In a subsequent motion to suppress both his October 9 and October 12 statements, the defendant did not include any objection to the August 25 statement. "Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof . . . ." See Rule 12(b)(3), (f), Tenn. R. Crim. P. At trial, the defendant expressly objected to both the October 9 and October 12 statements. The August 25 statement, however, was introduced without objection. Although the defendant asserts that he only learned of the policy against recording statements on cross-examining Detective Russell at trial, he was aware well before trial that he had given three statements, none of which were electronically recorded. Therefore, the issue regarding the August 25 statement is waived. See T.R.A.P. 3(e), 36(a).

In denying the defendant's motion for new trial with respect to the failure to record his October 9 and October 12 statements, the trial court relied on our supreme court's decision in State v. Godsey, 60 S.W.3d 759 (Tenn. 2001). In Godsey, the defendant was questioned about the death of his girlfriend's infant child while in his care. Initially, he denied any involvement in the child's death but later gave about nine different versions of what happened, including one version in which his description matched closely the type of injuries the child had suffered. The defendant refused, however, to sign the written statement recounting this version. No portion of the defendant's interrogation was electronically recorded. In rejecting the defendant's claim that the failure to record his statements electronically violated his due process rights, the Tennessee Supreme Court noted that "neither the state nor the federal constitution requires electronic recording of interrogations." Id. at 771. While acknowledging the benefits of electronically recording statements in criminal cases, the court commented, as it had previously, that the issue was a matter of public policy best left to the legislature. Id. at 772; see State v. Odom, 928 S.W.2d 18, 23-24 (Tenn. 1996).

Godsey controls this issue. We disagree with the defendant's position that Detective Russell's testimony that electronic recording equipment was not used "as a matter of policy" distinguishes his case in any material respect from the situation presented in Godsey, in which the

officer testified that "we don't normally, as a rule, record our interviews." Id. at 771. This issue is without merit.

II. FAILURE TO PERMIT WITNESS TO INVOKE FIFTH AMENDMENT BEFORE JURY

During the defendant's case-in-chief, the defense sought to call co-defendant Fleenor to the stand in order to allow him to invoke his Fifth Amendment privilege against self-incrimination in front of the jury. The defendant contends that this action was necessary to rebut a suggestion by the state during its cross-examination of the defendant that the defense had not used an available witness.

In his own defense, the defendant generally testified that although Fleenor was the actual killer, he had confessed to the murder out of fear of Fleenor and Fleenor's father. The defendant further testified that while he and Fleenor were in the same jail, he saw Fleenor with a pocket knife and Fleenor had sent him cigarettes and candy as well as notes asking the defendant to cover for him. In cross-examining the defendant, the prosecutor stated, "Mr. Fleenor, by the way, is back here in the jail as of today, as we speak right now, is he not," and further noted that Fleenor was there, "at the request of your attorneys?"

In a jury-out hearing, the defense told the court that the defense brought Fleenor to the jail the day before to interview him but concluded they would not call Fleenor as a witness because he indicated he would not testify. The trial court noted Fleenor had already pled guilty to first degree murder for the victim's death and received a life sentence. The trial court also noted that at the time of the defendant's trial, Fleenor had a post-conviction petition pending and counsel had been appointed upon the court's determination that a colorable claim was presented. Defense counsel argued that in view of the prosecutor's suggestion that the witness had been summoned and was available to testify, it was nonetheless necessary to call Fleenor to the stand to permit him to invoke his Fifth Amendment privilege before the jury. Defense counsel asserted that he did not want the jury to believe that the defense was hiding someone from them. The trial court refused to allow Fleenor to take the stand, relying on State v. Dicks, 615 S.W.2d 126 (Tenn. 1981).

In Dicks, the proffered witness was a co-defendant who had received the death penalty and whose case was pending on appeal at the time Dicks sought to have him testify or at least claim his privilege against self-incrimination before the jury. In a jury-out hearing, the trial court determined that the witness had not testified in his own trial and planned to exercise his Fifth Amendment privilege not to testify in Dicks' trial and thus excused him from taking the stand. On appeal, our supreme court saw "no basic error" in the trial court's action. Id. at 129. The court observed:

> The calling of a witness who will refuse to testify does not fill the purpose of compulsory process, which is to produce testimony for the defendant. United States v. Roberts, 503 F.2d 598, 600 (9th Cir. 1974). But if it did, where there is a conflict between the basic right

> of a defendant to compulsory process and the witness's right against self-incrimination, as in this case, the right against self-incrimination is the stronger and paramount right. Frazier v. State, 566 S.W.2d 545, 551 (Tenn. Crim. App. 1978). See United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973); United States v. Wyler, 487 F.2d 170 (2nd Cir. 1973); United States v. Beye, 445 F.2d 1037 (9th Cir. 1971). Further, a jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege against self-incrimination, whether those inferences be favorable to the prosecution or the defense. Bowles v. United States, 142 U.S. App. D.C. 26, 439 F.2d 536, 541 (D.C. Cir. 1970). See also United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973), wherein the court points out that:
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> > If it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. Neither side has a right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him.

Id; see State v. Harris, 839 S.W.2d 54, 72-73 (Tenn. 1992); see also State v. Burns, 777 S.W.2d 355, 359 (Tenn. Crim. App. 1989).

In the present case, the defendant's sole purpose in calling Fleenor to the stand was to allow him to assert his Fifth Amendment privilege in the jury's presence. In his proffer of this witness, defense counsel only confirmed that Fleenor would refuse to testify if called. Given the opportunity to tender, for the record, any other questions he would have asked had the witness been willing to testify, defense counsel declined. Counsel reiterated that the point was only to "let the jury know that he's not, not available to me, contrary to what the State said." In light of Dicks, the trial court did not err in declining to allow the defense to call the witness to the stand for the sole purpose of allowing the witness to assert his Fifth Amendment privilege before the jury.

III. SUPPRESSION OF POST-ARREST STATEMENTS

The defendant avers that his Sixth Amendment right to counsel was violated by the admission of statements made after adversarial proceedings were initiated but before he had the opportunity to consult with counsel. As in the trial court, the defendant places great emphasis on the detectives' testimony that they intended to interrogate the defendant as soon as he was arrested and their admission that they could have taken the defendant directly before a magistrate following his arrest but, instead, took him to police headquarters to interrogate him.

"A trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). "The application of the law to the facts found by the trial court, however, is a question of law which this Court reviews de novo." State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997) (citing Beare Co. v. Tennessee Dept. of Revenue, 858 S.W.2d 906, 907 (Tenn. 1993)).

Before trial, the defendant moved the court to suppress his post-arrest statements taken on October 9 in Michigan and on October 12 in Sullivan County. He asserted that the October 9 statement was induced by promises of preferential treatment and contended that, in exchange for his statement, detectives granted his request that he and his girlfriend be allowed to travel in the same car back to Tennessee from Michigan. The defendant claimed that, as a result, both the October 9 statement and the follow-up statement on October 12 were involuntary. The defendant also challenged the admission of both statements on the ground that they were taken in violation of his Sixth Amendment right to counsel.

At the suppression hearing, Detective Bobby Russell testified that on October 9, 2001, he and other Sullivan County law enforcement officers arrived in Michigan and arrested the defendant and his girlfriend pursuant to capiases issued by the Sullivan County Criminal Court. The defendant was taken to the Michigan State Police Headquarters, some thirty minutes away. Before interviewing him, Detective Russell informed the defendant of the charges against him and advised him of his Miranda rights. The defendant indicated he was willing to talk and signed an advice and waiver of rights form on October 9, 2001, at l:20 p.m. at police headquarters.

According to Detective Russell, the defendant never requested an attorney and was not threatened, coerced or promised anything to induce his statement. Detective Russell testified that he wrote down the defendant's statement and, at the conclusion of the interview, read it to the defendant and allowed the defendant to read it himself. The defendant initialed and signed the beginning and end of each page. The last sentence read: "This is a true and correct statement. I've not been threatened, promised anything or coerced." The interview concluded at 2:50 p.m., and the defendant was transported to the local jail. The following day, October 10, the defendant was taken before a magistrate in Marquette County, Michigan, where he waived extradition to Tennessee. Detective Russell testified that although the detectives drove two cars to Michigan, he granted the defendant's request that he be allowed to ride to Tennessee in the car with his girlfriend. Detective Russell testified that the defendant made this request after he had already spoken with the detectives and that allowing this travel arrangement was not contingent upon his giving a statement or part of any kind of agreement with the defendant. Detective Russell stated that during the two day drive to Tennessee, the defendant never requested an attorney and was never promised anything or threatened.

Detective Russell testified that when the group arrived at the Sullivan County Jail on the evening of October 11, the defendant asked to speak with him to clarify some things he had said. As a result, the defendant was brought to the detective division the next day. Detective Russell testified that the defendant did not request an attorney before speaking with detectives. The

defendant was advised of his Miranda rights again and executed a second waiver at 1:50 p.m. on October 12, 2001. Detective Russell testified that in the same manner as the first interview, he wrote the defendant's statement, read it to him and allowed him to read it himself, and had the defendant initial each page. According to Detective Russell, neither he nor Detective Strickler offered the defendant leniency or anything in exchange for his statement, and they did not threaten or coerce him to talk with them. At the conclusion of the interview, the defendant agreed to provide a blood sample and signed a consent form.

On cross-examination, Detective Russell testified that the detectives had planned to interrogate the defendant as soon as possible in Michigan and took him directly to police headquarters upon his arrest. Detective Russell was aware that once he was returned to Sullivan County, the defendant did not appear before a judge until after he had given his statement on October 12.[2]

The defendant testified that he gave the statement in Michigan because the detectives agreed to let him ride back to Tennessee with his girlfriend and because they told him they would "go easier" on him. The defendant stated he was not taken before a judge before giving his statement. On cross-examination, the defendant stated that he asked about traveling with his girlfriend after being interviewed but before signing his statement. He said no one ever told him he could not travel with her unless he talked with detectives. As to the October 12 interview, the defendant agreed that he asked to speak with the detectives again in an effort to help his girlfriend. The defendant stated he never requested counsel but knew from past experience that he had a right to an attorney if he had wanted one.

At the conclusion of the hearing, the trial court declined to suppress either statement, finding that both were voluntarily given. The court noted that before being questioned on October 9 in Michigan, the defendant waived his Miranda rights and that "there does not appear to be any threats, violence, chicanery or anything associated with that advise of rights." The court further found no evidence that officers bargained with the defendant regarding travel accommodations in return for his statement. As to the October 12 statement, the trial court found that the defendant initiated further discussion with detectives and then gave another statement and that nothing existed to indicate he was coerced, threatened or otherwise speaking involuntarily. With respect to the defendant's Sixth Amendment claim, the trial court observed:

> The defendant . . . urges the theory that there is a [Massiah][3] violation upon the theory, that prior to the time the defendant was

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[2]The record reflects that on October 18, 2001, the defendant first appeared before the trial court and counsel was appointed. On October 31, the defendant was arraigned.

[3]See Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203 (1964) (holding that a defendant is denied "the basic protections" of the Sixth Amendment "when there was used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel").

> accosted or arrested or confronted in the State of Michigan, that the presentment itself triggered Sixth Amendment protections and that from the point . . . the presentment was returned, that the Officers would have been absolutely precluded from questioning the defendant on Sixth Amendment principles and on [Massiah] principles.

"The Sixth Amendment right to counsel guarantees to a criminal defendant the right to legal assistance in any critical confrontation with state officials, irrespective of coercion." State v. Berry, 592 S.W.2d 553, 557 (Tenn. 1980). "The Sixth Amendment right to counsel does not attach until the adversarial judicial process has begun." Michigan v. Jackson, 475 U.S. 625, 629, 106 S. Ct. 1404, 1407(1986); State v. Huddleston, 924 S.W.2d 666, 669 (Tenn. 1996). In Tennessee, the adversarial judicial process is initiated at the time of the filing of the formal charge, such as an arrest warrant, indictment, presentment, or preliminary hearing in cases where a warrant was not obtained prior to the arrest. Id. (citing State v. Mitchell, 593 S.W.2d 280, 286 (Tenn. 1980); State v. Butler, 795 S.W.2d 680, 685 (Tenn. Crim. App. 1990)).

In the present case, the presentment was issued on October 3, 2001. The defendant's first interview after the filing of formal charges took place on October 9. His Sixth Amendment right to counsel had attached at that point. In arguing his motion before the trial court, defense counsel took the position that "following indictment, it's simply improper for police officers to attempt to interrogate someone in the absence of counsel." The state urges that in waiving his Fifth Amendment protections, the defendant thereby waived his Sixth Amendment right to counsel as well. We agree with the state.

The Fifth Amendment of the United States Constitution protects against compulsory self-incrimination. The privilege against self-incrimination "is fully applicable during a period of custodial interrogation." Miranda v. Arizona, 384 U.S. 436, 460-61, 86 S. Ct. 1602 (1966). Miranda holds that incriminating statements obtained during custodial interrogation are not admissible unless the suspect validly waives his Fifth Amendment privilege before making the statements. Id. 384 U.S. at 475, 86 S.Ct. at 1628. In Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389 (1988), the United States Supreme Court considered the defendant's Miranda waiver of his Fifth Amendment rights relative to his Sixth Amendment right to counsel. In that case, after being indicted for murder, the petitioner voluntarily spoke with authorities on two separate occasions after first being advised of his Miranda rights. The petitioner's statements were introduced at trial and he was convicted as charged. The petitioner did not dispute that he had been advised of his right to counsel under Miranda. In an argument closely parallel to the defendant's argument in the present case, the petitioner argued that

> because his Sixth Amendment right to counsel arose with his indictment, the police were thereafter barred from initiating a meeting with him. He equates himself with a preindictment suspect who, while being interrogated, asserts his Fifth Amendment right to counsel; under Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880,

> 68 L. Ed. 2d 378 (1981), such a suspect may not be questioned again unless he initiates the meeting.

Patterson, 487 U.S. at 290, 108 S. Ct. at 2393-94 (citations omitted). The Supreme Court rejected the petitioner's claim of a Sixth Amendment violation as follows:

> Petitioner, however, at no time sought to exercise his right to have counsel present. The fact that petitioner's Sixth Amendment right came into existence with his indictment, i.e., that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned. Had petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting). This was our holding in Michigan v. Jackson, supra, which applied Edwards to the Sixth Amendment context.

Id. 487 U.S. at 290-91, 108 S. Ct. at 2394.

"As a general matter, then, an accused who is admonished with the warnings prescribed by this Court in Miranda, has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." Id., 487 U.S. at 296, 108 S. Ct. at 2397 (citation omitted). In view of the defendant's uncontested waiver of his Fifth Amendment rights under Miranda, we reject the defendant's argument that the initiation of adverse judicial proceedings in the case at bar absolutely barred police from interrogating him in the absence of counsel.

Finally, we infer from the defendant's insistence that he should have been taken directly to a magistrate before being interviewed an assertion that something more than advice of his rights by law enforcement officers was required to support a valid waiver of his Sixth Amendment right to counsel. In Patterson, however, the Supreme Court rejected the holding of the second circuit court of appeals that any waiver of the Sixth Amendment right to counsel in the context of post-indictment questioning "can only properly be made before a 'neutral . . . judicial officer.'" Patterson, 487 U.S. at 295 n.8, 108 S. Ct. at 2396 n.8 (quoting United States v. Mohabir, 624 F.2d 1140, 1150-53 (2d. Cir. N.Y. 1980)).

Based on the foregoing, we conclude the defendant's post-indictment statements were not taken in violation of his Sixth Amendment right to counsel. The trial court properly admitted the defendant's statements at the trial.

IV. AGGRAVATING CIRCUMSTANCES UNDER APPRENDI

The defendant asserts that the trial court erred in denying his motion to dismiss the state's notice of intent to seek the death penalty. He contends that under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), the grand jury was required to set forth in the indictment the statutory aggravating circumstances relied upon to support a death sentence under T.C.A. § 39-13-204(i).

Other than his citation to Apprendi, the defendant offers no argument regarding this issue. In any event, our supreme court has repeatedly rejected the defendant's argument that under the principles of Apprendi, Tennessee's capital sentencing scheme requires that aggravating circumstances be alleged in the indictment. See State v. Odom, 137 S.W.3d 572, 591 (Tenn. 2004); State v. Holton, 126 S.W.3d 845, 862-63 (Tenn. 2004); State v. Carter, 114 S.W.3d 895, 910 n.4 (Tenn. 2003); State v. Dellinger, 79 S.W.3d 458, 466-67 (Tenn. 2002), cert. denied, __ U.S. __, 123 S. Ct. 695 (2002). In State v. Berry, 141 S.W.3d 549, 559-60 (Tenn. 2004), the court revisited the issue at length and reaffirmed its holding in Dellinger, that the state is not required to charge aggravating circumstances in an indictment. See also State v. Leach, 148 S.W.3d 42, 59 (2004). This issue is without merit.

V. MANDATORY REVIEW

We are required to review the sentence of death to determine whether the sentence was imposed in any arbitrary fashion; whether the evidence supports the jury's finding of statutory aggravating circumstance or circumstances; whether the evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. T.C.A. § 39-13-206(c)(1).

Upon our review of the record, we find nothing to suggest that the sentence of death was imposed in an arbitrary manner. We also conclude that the proof overwhelmingly established that the defendant had prior violent felony convictions, that the murder involved serious physical abuse beyond that necessary to produce death, that the defendant committed the murder to avoid arrest or prosecution, that the murder was committed while the defendant had a substantial role in a robbery, and that the murder victim was over seventy years of age. See T.C.A. §§ 39-13-204(i)(2), (5), (6), (7), (14). Further, the record supports the jury's determination that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt.

Finally, we must determine whether the defendant's sentence is disproportionate to the sentences imposed in other, similar cases. T.C.A. § 39-13-206(c)(1)(D); State v. Bland, 958 S.W.2d 651, 661-674 (Tenn. 1997), cert. denied, 523 U.S. 1083, 118 S. Ct. 1536 (1998). The comparative proportionality review is "designed to identify aberrant, arbitrary, or capricious sentencing by determining whether the death penalty in a given case is 'disproportionate to the punishment imposed on others convicted of the same crime.'" State v. Stout, 46 S.W.3d 689, 706 (Tenn. 2001) (quoting Bland, 958 S.W.2d at 662)). "If a case is 'plainly lacking in circumstances consistent with

those in cases where the death penalty has been imposed,' then the sentence is disproportionate." Stout, 46 S.W.3d at 706 (quoting Bland, 958 S.W.2d at 668).

We begin with the presumption that the sentence of death is proportionate with the crime of first degree murder. See Terry v. State, 46 S.W.3d 147, 163 (Tenn. 2001) (citing State v. Hall, 958 S.W.2d 679, 699 (Tenn.1997), cert. denied, 524 U.S. 941, 118 S. Ct. 2348 (1998)). This presumption applies only if the sentencing procedures focus discretion on the "'particularized nature of the crime and the particularized characteristics of the individual defendant.'" Terry, 46 S.W.3d at 163 (quoting McCleskey v. Kemp, 481 U.S. 279, 308, 107 S. Ct. 1756 (1987)). In completing our review, we are aware that "no two cases involve identical circumstances." Terry, 46 S.W.3d at 164. Accordingly, there is no mathematical or scientific formula to be employed.

In comparing this case to other cases in which the defendant was convicted of the same or similar crimes, we look at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved. Bland, 958 S.W.2d at 664. Regarding the crime itself, we consider the following factors in identifying and comparing similar cases: (1) the means of death; (2) the manner of death (e.g., violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on nondecedent victims. Id. at 667. Non-exclusive factors relevant to our comparison of defendants in capital cases include: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of helplessness of victim(s); and (8) the defendant's capacity for rehabilitation. Id.

Applying these factors to the present case, the proof showed the defendant knew that the elderly victim carried large amounts of cash and shared this information with his primary accomplice. The murder was certainly premeditated. Before the robbery, the defendant and his accomplice discussed the importance of leaving no witnesses. The defendant purchased four pairs of gloves and drove himself and all three accomplices to the location of the victim's home and business. The defendant lured the victim from his camper under the pretense of purchasing bait. As the victim leaned over and scooped minnows from a tank, the defendant "squeezed his shoulder pretty hard." When the victim reached for his gun, the defendant took it away, then pulled out his own knife and slashed the victim across the neck. As the victim struggled, the defendant continued his assault, stabbing the victim at least twenty-seven times. The victim was alive and experienced multiple, painful wounds before the fatal wound was inflicted. The defendant did not leave until he made certain that the victim was dead. After the murder, the defendant disposed of the victim's gun and other belongings and relocated out of state where he was arrested without incident.

At the time of the murder, the defendant was thirty-seven-years-old. He had two prior convictions for aggravated assault. Both convictions arose out of an incident in February 1996 in which the defendant was a passenger in a car leaving a home that had been burglarized when the female homeowner returned and attempted to stop the car. The defendant stuck his arm out the window and pointed a pistol at the victim as the driver of the car pushed the victim's car onto the road with two young children still inside. Through a 1978 psychological report, the defendant presented evidence that he came from a broken home and lived with his grandmother. The defendant's mother had a third grade education and was mentally and physically ill. The defendant testified that his mother had died while he was awaiting trial in the present case. Academic tests revealed that at age fourteen, the defendant's IQ was just above retarded and that he was operating at a second-grade level in all areas. The defendant dropped out of vocational school and developed a fifteen-year cocaine addiction. The defendant stated that he was on cocaine on the night of the murder. In separate statements, the defendant twice confessed that he stabbed the victim to death and told officers he needed to be punished. At trial, the defendant denied any part in the killing, placing the blame on a co-defendant.

We have reviewed the circumstances of the present case and conclude that the death penalty imposed in the present case is not excessive or disproportionate to the penalty imposed in similar cases. See e.g., State v. Bush, 942 S.W.2d 489 (Tenn. Apr. 7, 1997), reh'g denied (Tenn. Apr. 28, 1997), cert. denied, 522 U.S. 953, 118 S. Ct. 376 (1997) (holding where seventy-nine-year-old widow repeatedly stabbed to death in her home by defendant during a first degree burglary, jury properly found (i)(5) and (i)(6) aggravating circumstances in imposing death sentence); State v. Harris, 839 S.W.2d 54 (Tenn. 1992) (holding where thirty-two-year-old defendant murdered two employees of hotel during robbery, jury properly imposed death sentences based upon (i)(2), (i)(5), and (i)(7) aggravating circumstances despite evidence of defendant's lack of education and troubled childhood); State v. McNish, 727 S.W.2d 490 (Tenn. 1987) (holding death sentence proper where defendant sentenced to death based upon (i)(5) aggravator in bludgeoning death of seventy-year-old widow); State v. King, 694 S.W.2d 941 (Tenn. 1985) (holding where thirty-three-year-old defendant murdered the proprietor of a tavern during the course of a robbery, death sentence proper based upon (i)(2) and (i)(7) aggravating circumstances); State v. Campbell, 664 S.W.2d 281 (Tenn. 1984) (holding sentence proper where defendant beat seventy-two year old man to death during course of a robbery and was sentenced to death upon finding of (i)(2), (i)(5), and (i)(7) aggravators); State v. Harries, 657 S.W.2d 414 (Tenn. 1993) (holding sentence proper where defendant shot eighteen-year-old clerk to death during the robbery of a convenience store and death sentence based upon jury's finding of (i)(2) aggravating circumstance); see also State v. Andrew Thomas and Anthony Bond, No. W2001-02701-SC-DDT-DD (Tenn. Mar. 4, 2005) (holding where defendant shot Walgreens store clerk to death in the course of a robbery, death penalty properly imposed based on finding of (i)(2) aggravating circumstance); State v. Paul Dennis Reid, Jr., No. M2001-02753-CCA-R3-DD (Tenn. Crim. App. Dec. 29, 2003) (holding where defendant kidnapped and stabbed two young employees to death following robbery of ice cream store, jury properly imposed death penalty upon finding of (i)(2), (i)(5) and (i)(6) aggravating circumstances).

The death sentence has also been upheld in similar cases based on the sole aggravating circumstance of a prior violent felony conviction, T.C.A. § 39-13-204(i)(2). See, e.g., State v. McKinney, 74 S.W.3d 291 (Tenn. 2002) (prior conviction for aggravated robbery as adult and aggravated assault as juvenile); State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000) (prior convictions for attempted especially aggravated robbery and attempted first degree murder); State v. Keough, 18 S.W.3d 175, 183 (Tenn. 2000) (prior convictions for assault to commit voluntary manslaughter and manslaughter); State v. Smith, 993 S.W.2d 6 (Tenn. 1999) (prior convictions for robbery and first degree murder); State v. Adkins, 725 S.W.2d 660 (Tenn. 1987) (prior conviction for aggravated assault); State v. Harries, 657 S.W.2d 414 (Tenn. 1983)(prior robbery conviction); see also, State v. Robert Faulkner, No. W2001-02614-CCA-DDT-DD (Tenn. Jan. 28, 2005) (prior convictions for second degree murder, assault with intent to commit robbery, assault with intent to commit voluntary manslaughter, and robbery). The prior violent felony factor is an aggravating circumstance that this court has described as "more qualitatively persuasive and objectively reliable than others." McKinney, 74 S.W.3d at 313; State v. Howell, 868 S.W.2d 238, 261 (Tenn. 1993);

We conclude the sentence of death imposed upon the defendant is proportionate to the penalty imposed in similar cases. In so concluding, we have considered the entire record and determined that the sentence of death was not imposed arbitrarily, that the evidence supports the jury's finding of the (i)(2), (i)(5), (i)(6), (i)(7), and (i)(14) aggravating circumstances, that the evidence supports the jury's finding that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt, and that the sentence is not excessive or disproportionate. In consideration of the foregoing and the record as a whole, the judgments of conviction are affirmed.

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JOSEPH M. TIPTON, JUDGE